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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1919

ROBERT LEE WILLIS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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ROBERT LEE WILLIS,
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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Robert Lee Willis, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals, Tenth Circuit, in Appeal No. 73-1433, United States of America, Appellee, vs. Robert Lee Willis, Appellant, which opinion was rendered April 19, 1974, and an order denying petitioner's petition for rehearing entered May 22, 1974, and the judgment of the Court entered June 6, 1974.

OPINION BELOW

The per curiam opinion of the Court of Appeals is not reported. It appears in the Appendix at page A1. The petition for rehearing in banc appears in the Appendix

at page A5. The order denying the petition for rehearing in banc appears in the Appendix at page A12. The judgment of the Court of Appeals, Tenth Circuit, appears in the Appendix at page A13.

JURISDICTION

This petition for a writ of certiorari is being made to this Court within the time prescribed by Rule 22, Paragraph 2, of this Court and 28 U.S.C. 1254(1). The opinion of the Court of Appeals of the Tenth Circuit was rendered and entered April 19, 1974.

The opinion denying petitioner's motion for rehearing in banc was made and entered May 22, 1974 and the order affirming the judgment of the District Court for the District of Kansas was made and entered June 6, 1974.

QUESTIONS PRESENTED FOR REVIEW

1. Whether government counsel's arguments to the jury were prejudicial and deprived petitioner of a fair trial in violation of his constitutional rights under the 14th Amendment to the Constitution of the United States.

2. Whether the Court's ruling that an F.B.I. Agent did not have to reveal to defense counsel for use in evidence the contents of the Agent's notes, memoranda and writings concerning letters the Agent wrote to an inmate of the Kansas State Penitentiary, who testified against your petitioner "which inmate was a former informant for the Agent", when the Agent did not keep copies of his letters to the inmate which letters were sent by the Agent to the inmate under the guise of being personal

letters from the F.B.I. Agent as the inmate's lawyer. This was admittedly done so that the letters would reach the inmate without being opened by officials at the penitentiary. The inmate whose name was Herbert Fagan did not testify at petitioner's first trial but was called as a surprise witness by the government at petitioner's second trial.

NATURE OF THE CASE

Petitioner, Robert Lee Willis, was indicted by a Grand Jury together with six other persons charging robbery of the Tower State Bank in Kansas City, Kansas on November 9, 1970, in violation of 18 U.S.C. 2113(a)(d) and 18 U.S.C. 2. Your petitioner's defense was that he did not participate in the robbery of the bank as a principal or accessory and that he knew nothing of the robbery. At his first trial, he was found guilty by a jury and appealed from the conviction to the Tenth Circuit Court of Appeals which Court granted him a new trial for the reason that the government witness, Thomas Colvin, a 30 capsule a day heroin addict, through his appointed counsel, made an agreement with the government which agreement was not disclosed to defendant or his counsel before or after trial, the agreement being that at least eight felony cases then pending against Thomas Colvin in State and Federal Courts in Missouri and Kansas would be dismissed or not prosecuted if the witness did testify against your petitioner and his co-defendants at their forthcoming trial for bank robbery. Petitioner's counsel found out about this agreement to dismiss the felony charges against Thomas Colvin after petitioner's conviction but before petitioner's motion for new trial was ruled on. Your petitioner's counsel then amended his motion for new trial

to include the existence of the agreement between witness Colvin, his counsel, the United States Attorney at Kansas City, Missouri and the F.B.I., which motion as so amended was overruled by the District Court. Your petitioner then appealed to the Tenth Circuit Court of Appeals which reversed your petitioner's and his co-defendants' conviction and remanded the case for a new trial. The opinion of the Tenth Circuit is entitled *United States v. William Wesley Harrison, et al.*, 462 F.2d 1033.

At the second trial, the government produced a surprise witness, Herbert Fagan, a former informant for Agent Richard W. Martin, F.B.I., when he was stationed in Kansas City before he was transferred to the Chicago office of the F.B.I., where he was stationed at the time of petitioner's second trial. During the period between petitioner's first trial and his second trial, Herbert Fagan had been convicted of aggravated burglary and aggravated robbery in Douglas County, Kansas, and had been sentenced to and was confined in the Kansas State Penitentiary. The appeal from his conviction is reported in 213 Kan. 587, ... P.2d .....

When Agent Martin found out that his former informant was incarcerated, he wrote Herbert Fagan at the Kansas State Penitentiary inquiring as to what he could do for Herbert Fagan. Herbert Fagan then wrote a series of eight letters to Agent Martin at the Agent's Chicago office and managed to place a telephone call to Agent Martin from the penitentiary once. In the series of letters to Agent Martin, Herbert Fagan informed Martin that he had read about the reversal of petitioner's conviction in the penitentiary Law Library and that he wanted to nail Robert Lee Willis, your petitioner. Agent Martin answered the letters he had received from Herbert Fagan in block letters on a legal pad, kept no copy, and mailed

the letters to Herbert Fagan with the title of lawyer so that his letters would appear to the penitentiary officials as being letters to Herbert Fagan from Herbert Fagan's lawyer. Cross-examination of Agent Martin revealed the series of letters from Herbert Fagan to Agent Martin and from Agent Martin to Herbert Fagan and the telephone call.

Counsel for your petitioner had not been informed that the letters from Herbert Fagan were in existence. The second day of trial, the United States Attorney produced the letters from Herbert Fagan to Agent Martin at the opening of Court and the Court gave defense counsel, who were three in number, ten minutes to acquaint themselves with the letters. The Omnibus Hearing Report drafted by the United States Commissioner and approved by the Judge required the government to disclose any evidence it may have discovered subsequent to the Omnibus Hearing, to defense counsel and exchange the names of witnesses with defendant ten days prior to trial.

Agent Martin was then re-examined after defense counsel had read the letters out of the hearing of the jury. The testimony of government witness, Herbert Fagan, commences at page 276 of Volume 3 of the Record on Appeal and his cross-examination commences at page 322. Herbert Fagan testified that he contacted Agent Martin of the F.B.I. in Chicago last summer (1972) and said he would like to testify in this case, that he contacted Agent Martin a couple of days ago (March 19, 1973, the date the trial commenced) and that he did not talk to an F.B.I. Agent prior to March 19 when he gave his statement to the F.B.I. Fagan further testified that he commenced writing letters to Agent Martin about July 15, 1972 and Fagan admitted that he lied when he did not implicate himself when Agent Martin contacted him

shortly after the bank robbery. (Record 352 to 355) When asked if the F.B.I. Agent would recommend prosecution of him on the bank robbery charge, Fagan answered, "I don't think he would because I am coming forth with my involvement." (Pages 359-360) At page 385 (morning session, about 9:00 a.m., 3/21/73), the United States Attorney, Mr. Kelly, advised the Court that since the close of the trial yesterday, the government determined that Agent Martin preserved the letters written by Fagan to him being eight in number, the context of which may be favorable on the issue of guilt and Mr. Kelly further said that at one time, Fagan was an informant for the F.B.I. The Court gave defense counsel ten minutes to read the letters. (Page 386) When the Court asked counsel if they were ready to proceed, Mr. Joyce of defense counsel, made the following objection: "At this time, Your Honor, I move the Court for an order striking out all of the testimony of Witness Fagan for the reason that the government had information in its possession and under its control which it did not supply us and they said at that time that the interview of the 19th of this month, in other words the day this trial started, was the only one they had from Fagan.

"Now, I know and I have been in the position that Mr. Kelly is now, where he may or may not have known of it. I give him the benefit of the doubt that he didn't know of it and these things have come up before when Judge Stanley was judge and Judge Stanley held as long as information was in the government's possession, that the United States Attorney was charged with it, whether it was in Washington, the F.B.I. office in Kansas City or where. The fact it wasn't in the United States Attorney's file made no difference because the United States Attorney only gets what they send him and they—there may be information on these cases in the files of the

F.B.I., in the files of the Department of Justice, in the files of any of the police forces of the United States that doesn't get to the United States Attorney and if you are going, in these cases, to excuse it just because the United States Attorney didn't have it, it just encourages holding back information from the United States Attorney and Mr. Kelly wouldn't be the first United States Attorney that information was held back from, and therefore I move that these statements be stricken."

THE COURT: "The defendant's motion to strike is denied."

Cross-examination of Herbert Fagan relative to the eight letters was then conducted commencing at page 389. Fagan testified that he read about the reversal of the first trial in the Law Library at the penitentiary. (Record page 394) In his first letter to Agent Martin read in evidence, Fagan said, "Eddie Cox is in here and told me Bob Willis and his crew got their appeal through so if you need two witnesses, let me know so I am watching my step." (Record page 402) At page 410 of the Record, the letter says, "If you want me to nail Willis and Harris in their new trial, let me know."

At Record page 416, Fagan's letter to Martin said, "I received your last letter concerning the trial. I'm very interested in helping."

Fagan began working as an F.B.I. informer in August of 1970. (Record 493)

Mr. Kelly, Ass't U. S. Atty., informed the Court the copies of Agent Martin's letters to Fagan were not in existence because the F.B.I. don't keep copies of personal letters. (Record 514) Fagan, interviewed after the bank robbery, told Agent Martin that he did not know anything about the robbery for the reason that if he participated

in it, he might be prosecuted. (Record 519) Fagan then testified that he was an informant for Agent Martin, "I guess all the way up to today."

Richard W. Martin, F.B.I., testified that as an informant, Fagan was paid on a C.O.D. basis. There is nothing in Fagan's letter to indicate whether or not the letters came from a particular envelope. Agent Martin did not keep copies of his letters for they were not on F.B.I. stationery, they were on plain paper and plain envelopes were used and they were written by Agent Martin as his personal letters. Agent Martin further testified that in December, 1973, after Christmas, Agent Martin received a telephone call from Fagan stating that he was in the Kansas State Penitentiary. (Record 530 to 534)

The participants in the bank robbery were discussed in the telephone call. (Record 536) Fagan informed Agent Martin that his testimony would be helpful to the government. (Record 538)

Defense Counsel moved that this answer be stricken, that is the answer that Fagan's testimony would be helpful to the government's case. (Record 538) Whereupon a hearing in the presence of the jury but out of their hearing, was had by the Court. Counsel for petitioner moved for a mistrial by reason of the admission of the testimony particularly the inference that may be drawn by the jury therefrom. The Court said, "This is conversation with Mr. Fagan, not the agent, so it couldn't be prejudicial." (Record 538) However, thereafter, the Court reversed itself and informed the jury that the objection was sustained and admonished the jury to disregard it. (Record 539)

Agent Martin then said that he told Herbert Fagan that the Kansas Parole Board would be made aware of

the fact that he testified on behalf of the government. (Record 540) Agent Martin further testified that the reason that legal pads were used in plain white envelopes in his communication with Fagan was that Fagan felt his life may be in jeopardy. (Record 543) Agent Martin then testified that the correspondence he had with Fagan was on a personal basis, not an official basis, that he had no cases in Kansas City assigned to him other than possible leads he was working, at the request of the Kansas City Office. Agent Martin also told Fagan that he would make Fagan's contact with him known to Mr. Kelly, the Assistant U. S. Attorney at Kansas City, Kansas, who tried the case. (Record 545)

In all of the dealings with Fagan, Agent Martin said he did not know that Fagan was one of the bank robbers until December 19th, the day the second trial started. (Record 570 to 573) Martin was then asked what forms he made out to record his interviews with Fagan. His answer was, "It is none of your business." He then said he made out a form on his interviews with Fagan. (Record 570) He was asked how many such forms were made out. Mr. Kelly objected on the ground of immateriality and the Court sustained the objection. (Record 576)

In July of 1972, Agent Martin communicated with his Kansas City Office and advised them of Fagan's letters and the Kansas City Office, in turn, communicated with Mr. Kelly, the Assistant United States Attorney. (Record 579) Agent Martin advised Mr. Kelly, Assistant U. S. Attorney, that he brought the Fagan letters to Kansas City with him before the trial (Record 580) so the statement Mr. Kelly made at page 385 of the Record that he had just ascertained that the letters were in existence was incorrect as he was told by Martin prior to the time the trial started that Martin had brought the letters with

him. Agent Martin further testified that he sent a communication to the Kansas City Division, F.B.I., that he was receiving correspondence from Herbert Fagan. (Record 581 and 582) At page 582, defense counsel asked Agent Martin how many reports (notes, writings and memoranda) were made out including the reports Martin described as "none of your business" reports. Objection to this question was made by the United States Attorney and sustained by the Court. (Record 582)

At this time, defense counsel for petitioner moved the Court for an order requiring the government, including the United States Attorney, the F.B.I. and any other government agency that is interested, to produce all notes, memoranda and reports by whatever name they are known, including the ones that are made out on "none of your business" forms to be turned over to defense counsel because the only report we have is dated March 19, 1973, the date this case went to trial. Counsel further stated that he felt that he was entitled to this information under the Jencks Act, 18 U.S.C. 3500, and not just the information that the government wished to supply defense counsel. Assistant United States Attorney Kelly replied that the Witness Martin had testified that these are internal F.B.I. agency documents and are forms filled out on an informant basis type of relationship and that the government did not think they are Jencks Act material.

Defense counsel for defendant Odom joined in the motion. (Record 584) Defense counsel for defendant Odom stated that the whole case involved the question of good faith and failure on the part of the government to turn over all the information it had. He was not saying that Mr. Kelly intentionally withheld anything but it is obvious that the government knew about the status of Herbert Fagan long before the case came to trial and that

it was prejudicial to the defense that the information was not furnished immediately before Herbert Fagan testified.

The Court then asked the other defendants if they wanted to join in the motion and they stated that they did. The Court then said, "The motion for an order requiring the government to furnish the items is denied." (Record 586)

Kenneth Leon Lewis, Jr., was then called by the government as a witness but failed to identify the defendants. His testimony appears in the Record from pages 591 to 687. At page 598, he was asked by Mr. Hamill, Assistant United States Attorney, if at the Grand Jury hearing he was asked to identify certain photographs. He answered, "Yes, Sir." He was then asked, "And do you remember identifying four different photographs, one each, of Mr. Robert Willis, Mr. William Harris, Miss Marcella Odom and Miss Rosalind Monroe?"

Answer: "I remember looking at the photographs. I wasn't particularly certain of, I believe, two photographs but I was told that was the individuals who were in question and so therefore I went ahead and identified the photographs." (Record 598 and 599) (It was Colvin and Lewis that actually held up the bank.)

Opening arguments of Mr. Hamill, the Assistant United States Attorney, commence at the bottom of page 1087 to the top of page 1159. Defense arguments commence at the top of page 1159 and end on page 1175. The arguments of the government by Mr. Kelly commence at page 1175 and end at page 1200.

Thomas Colvin, prior to the first trial, entered a guilty plea in the United States District Court for the District of Missouri on a Rule 20 Transfer, on the bank robbery charge and entered a plea to a Missouri bank robbery.

Before he testified, Herbert Fagan was told that the fact he had testified for the government would be made known to the Kansas Parole Board for their consideration. Therefore, he was also under the hope of obtaining leniency in exchange for his testimony.

In argument to the jury, defense counsel referred to the fact that government witnesses, Colvin and Fagan, had lied on the witness stand, their testimony is replete with admissions of not telling the truth. The government counsel, in argument to the jury, said: "The defense asserts that this Court as well as other United States District Courts, condone, encourage and want perjury from the people who say, it is conducting a presentence for and also the United States Board of Paroles wants and encourages perjury."

This statement was objected to by defense counsel as follows: "If your Honor, please, I don't think there was any such insinuation by any of the defense lawyers and I object to it."

The Court: "Well, members of the jury, this is just argument. That's all it is. You can take it for what it is worth."

The United States Attorney further said, "Well, Mr. Fagan, I submit, notes that Harris and Willis are at the top of the organization and they are the ones responsible and for that reason he has talked about them and the organization, meaning them all." Objection was made to this last statement and was sustained but the damage was done and the Court did not tell the jury to disregard the statement of counsel.

The United States Attorney further said: "Mr. Lewis, well, he probably helped himself as much as he could

by refusing to identify the defendants. We are not mad at him. We won't be out to get him."

Defense counsel objected to this statement and the objection was overruled. This statement was an assertion by government counsel that Lewis could have identified the defendants. Each of the above statements were prejudicial to the defendant, implying to the jury that the United States Attorney knew more about the case than the evidence showed and were therefore highly prejudicial to a fair trial for petitioner and deprived him of his constitutional rights under the 14th Amendment.

QUESTIONS INVOLVED

1. The argument of the United States Attorney to the jury prejudiced defendant's right to a fair trial warranting a reversal ordering a new trial and we submit that the opinion and judgment of the Tenth Circuit is in conflict with the decision of this Court in *Berger* v. *United States*, 295 U.S. 78, 55 S.Ct. 629, and decisions of the Third, Sixth and Eighth Circuits.

2. The government withheld from discovery by the petitioner and his co-defendant the forms F.B.I. Agent Martin filled out concerning his notes, memoranda and writings relative to the contents of his letters, of which he did not keep a copy, to his informant, Herbert Fagan, at the Kansas State Penitentiary. These forms filled out by Agent Martin were the best evidence available as to the contents of his letters and these notes, petitioner contends, were discoverable to aid counsel for the defense in cross-examining both Herbert Fagan and Agent Martin and to test their credibility and truthfulness as to the contents of the letters by Agent Martin to his informant, Herbert Fagan. Defendant's effort to obtain discovery

of such notes, memoranda and writings was denied by the Court after Agent Martin, when asked to produce the notes, memoranda and writings, answered defense counsel that it was "none of his business" and when defense counsel requested the Court to require Agent Martin to produce his notes, government counsel objected and the Court sustained the objection.

It is the contention of petitioner that these notes, writings and memoranda are discoverable under Rule 16 of the Federal Rules of Criminal Procedure and 18 U.S.C. 3500 and that by reason of the denial thereof petitioner is entitled to a new trial.

BRIEF

First Contention. The remarks of the prosecution in argument to the jury hereinbefore set out notwithstanding the fact that defense counsel referred to government witnesses as liars when both government witnesses, Thomas Colvin and Herbert Fagan, admitted that they had both told untruths, therefore there was no question as to the fact that they were prevaricators of the truth. The remarks of the prosecutor in argument to the jury deprived petitioner of a fair trial in violation of his constitutional rights for the remarks of the prosecutor were not based on the evidence as were the remarks of the defense counsel. Thomas Colvin, under oath, at the first trial, testified that government witness Herbert Fagan was in California at the time of the bank robbery. On cross-examination, at the second trial, he testified that he said this to protect Thomas Colvin and Thomas Colvin, on cross-examination, admitted that he participated in the robbery of the bank herein involved and did not tell the truth to Agents of the F.B.I. when he told them, a few days after the robbery,

that he did not know or have any information about the robbery. The holding of the Tenth Circuit in this case in its memorandum opinion referred to its latest prior case relative to prejudicial arguments of counsel, i.e. *United States* v. *Coppola*, 479 F.2d 1153 (C.A. 10). There no objections were made to the prosecutor's remarks and the Tenth Circuit, in its opinion, said at lc 1163:

> "No objection was made to the expressions of personal opinion and to the remarks, and hence these references probably could not furnish a basis for reversal. See Devine v. United States, 403 F.2d 93, 96 (10th Cir. 1968), cert. denied, 394 U.S. 1003, 89 S.Ct. 1599, 22 L.Ed.2d 780 (1969); Van Nattan v. United States, 357 F.2d 161, 163 (10th Cir. 1966). Since, however, the case is to be retried, it is appropriate to point out the impropriety of arguments which are designed primarily to inflame and prejudice rather than to enlighten. Throughout the transcript it is apparent that the government attorney's strategy was primarily to put emphasis on defendant's deep involvement in the heroin traffic. It was proper to show the evidence as to the heroin insofar as it related to the conspiracy to murder and the actual murder. The heroin evidence was, however, emphasized unnecessarily. Also, it is not appropriate for the prosecutor to offer his own opinions as to guilt. This not only violates the canon of ethics, it is invalid, for he is not a witness in the case, he is a representative. Cf. Hall v. United States, 419 F.2d 582, 587-588 (5th Cir. 1969); Devine v. United States, supra, at 96 of 403 F.2d 93.
>
> In summary then: insofar as the heroin issue showed motive for the murder it was relevant.
>
> This is such an explosive issue that its presence in a case produces a conviction almost automatically re-

gardless of the depth of the evidence. For this reason, undue and unjustified emphasis must be avoided. Inferences which fairly reflect the record are proper argument. Methods designed to arouse prejudice, passion, and use of invective are not proper argument."

In *Dunn* v. *United States*, 307 F.2d 883 (C.A. 6) it was said that the United States Attorney in a criminal proceeding carries a double burden of an obligation to the government to conduct his case zealously and also an obligation of fairness to the accused. See also *Handford* v. *United States*, 249 F.2d 295 (C.A. 6); *McFarland* v. *United States*, 150 F.2d 593 (D.C. Cir.); *Baker* v. *United States*, 115 F.2d 533 (C.A. 8); *United States* v. *Lawson*, 337 F.2d 800 (C.A. 3), cert. denied, 380 U.S. 919, 85 S.Ct. 913, 13 L.Ed.2d 804; *United States* v. *Kravitz*, 281 F.2d 581 (C.A. 3), cert. denied, 364 U.S. 941, 81 S.Ct. 459, 5 L.Ed.2d 372; *Ross* v. *United States*, 180 F.2d 160; *United States* v. *White*, 324 F.2d 814 where the Court said that a lawyer in argument to the jury is not to assert his personal belief in justice of his cause. Ethics of American Bar Association, Canon 15.

In *Berger* v. *United States*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314, this Court said:

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows,

he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods, calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."

Second Contention. The government failed and refused to make available to petitioner the notes, memoranda and writings that Agent Martin made regarding the contents of his letters to Herbert Fagan of which letters he purposely did not make copies for he felt they were his personal and not official letters although he received Fagan's letters at the office of the F.B.I., answered them from the office of the F.B.I. and turned the information contained in Fagan's letters over to his superior. Petitioner therefore asserts that it was error for the government to withhold the letters from him and for the Court not to order the production of the letters so that counsel for defendants could use the same to cross-examine Agent Martin and Herbert Fagan and to test their veracity. In this connection, we wish to call the Court's attention to Volume 1, Federal Practice and Procedure, Wright, Section 259, dealing with the continuing duty to disclose under Rule 16 of the Rules of Criminal Procedure. In this connection, the author said:

"Rule 16(g) imposes a continuing obligation on a party who has already complied with a discovery order. If at any later time, prior to or at the trial, he finds

> additional material previously requested or ordered that is subject to discovery under the rule, he must promptly notify the other party or his attorney or the court of the existence of the additional material. Presumably if the new material is within a category as to which discovery previously has been ordered, the notice should be given to the opposing party or his attorney, and indeed in such cases the material itself should ordinarily be produced without awaiting a new court order. Where the additional material is of a sort as to which a previous request for discovery has been denied, or where there are grounds for seeking a protective order with regard to the new material, notice to the court might be appropriate."

and in the 1973 Pocket Part to Volume 1 for use during 1974, the author cites us to American Bar Association's Project on Standards for Criminal Justice Discovery and Procedure Before Trial, Approved Draft 1970, Section 42 and to the cases of *United States* v. *Kelly*, (C.A. 2, 1969) 420 F.2d 26 and *Pierce* v. *United States*, (C.A. 5, 1969) 414 F.2d 163, 169, cert. denied, 90 S.Ct. 435, 396 U.S. 960, 24 L.Ed.2d 425, to the effect that where prosecution has been ordered to furnish any information to defense, ruling must be complied with in spirit as well as letter and information may not be withheld with notion that that can be done with impunity if evidence is ultimately found not to be helpful to defense.

Third Contention. Kenneth Leon Lewis, Jr., a government witness, failed to identify petitioner at his second trial. Mr. Lewis testified that when he appeared before the grand jury he was shown photographs, that he remembered "looking at the photographs, I wasn't particularly certain of, I believe two photographs but I was told that was the individuals who were in question and so therefore

I went ahead and identified the photographs." (Transcript Record Vol. 3 pages 598 and 599) When asked why he could not positively identify these people at this particular time he said the reason he could not positively identify them "is because it has been a while after the thing happened, and if I identify these people now I wouldn't feel within myself that I am rightfully sure." (Record 650, 651) The prosecutor then asked to have the transcript of Colvin's testimony at the first trial introduced in evidence (no attempt was made by the prosecutor to cross-examine Colvin therefrom) the court said: "He has already acknowledged that he identified the four defendants here at the previous hearing so there is no necessity for it." The prosecutor then said that he did not know if defense counsel would stipulate that they (defendants) are the same, if so he would withdraw his request. The court then said in the presence and hearing of the jury: "This is a matter that the court will take judicial notice of from the record." This remark was highly prejudicial to the petitioner and deprived him of a fair trial for the reason that the court and not the jury made the determination, for the jury then had the court's opinion to the effect that witness Colvin identified the defendant positively at the first trial, a matter that should have been determined by the jury and not by the court.

Respectfully submitted,

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APPENDIX

OPINION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 73-1432-33

UNITED STATES OF AMERICA,
Appellee,

v.

WILLIAM WESLEY HARRIS and ROBERT LEE WILLIS,
Appellants.

Appeal From The United States District Court
For The District of Kansas
(D.C. # KC-CR-1372)
(Filed April 19, 1974)

PER CURIAM.

William Wesley Harris and Robert Lee Willis, in two appeals consolidated in this court, appeal from judgments of conviction, after a jury trial, of having violated 18

U.S.C. §§2, 2113(a), and (d). Initially, seven codefendants were charged in the indictment for the bank robbery.

The trial below was the appellants' second, following reversal and remand by this court of the first. United States v. Harris, 462 F.2d 1033 (10th Cir.). Appellants, along with defendants Monroe and Odom, who are not before the court in this appeal, were convicted primarily out of the mouths of Colvin and Lewis, the active participants in the bank robbery. Much of the appellants' briefs are concerned with the propriety of this "accomplice" or "informant" testimony.

Briefly stated, in the light most favorable to the Government, the record discloses the following events: On November 9, 1970, the Tower State Bank of Kansas City, Kansas, was robbed by Colvin and Lewis, who pleaded guilty before trial and testified against the other defendants. They testified that Harris and Willis arranged the overall plan of the robbery, including the theft of the "getaway" car by Fagan and another man, and "cased the heist" beforehand with them. Harris and Willis also arranged with Misses Odom and Monroe for a rendezvous where Colvin and Lewis would jump into the trunk of the women's rented car and be driven to a place where they could divide up the proceeds of this endeavor. All went according to plan, except that after the robbery the participants were not able to meet at Lewis' house because there were other people there; they met instead at the house of one Gordon. Harris and Willis helped in counting out the money which was divided among the various persons involved.

The record plainly shows that the witness Colvin had expectations of leniency in sentencing, and of non-prosecution for other offenses, both state and federal, in return

for his appearance as a witness. Likewise, the witness Fagan had some hope that the fact that he would testify on behalf of the Government would be relayed to his Parole Board, as he was incarcerated at the time. These facts were thoroughly explored by defense counsel during the course of the trial, as were the rather extensive criminal records of these witnesses. Their credibility thus became a matter for the jury to resolve.

The defendants urge that instructions referred to in On Lee v. United States, 343 U.S. 747, and in Todd v. United States, 345 F.2d 299 (10th Cir.), should have been given in this case. We find no facts in the record showing that any witness was an informer giving testimony in the circumstances referred to in the cited opinions. The testimony was given as accomplices, and adequate instructions were given on this point. The instructions, taken as a whole, United States v. Smaldone, 485 F.2d 1333 (10th Cir.); United States v. Beitscher, 467 F.2d 269 (10th Cir.), were adequate. *See* United States v. Owens, 460 F.2d 268 (10th Cir.); Butler v. United States, 408 F.2d 1103 (10th Cir.), and cases cited therein; *cf.* McGee v. United States, 402 F.2d 434 (10th Cir.). Specific instructions on identification could have been given, *see* Macklin v. United States, 409 F.2d 174 (D.C.Cir.), but the facts of this case fall within our decision in McGee and the District of Columbia Circuit's holding in Macklin.

The appellants also complain that statements made by the prosecution during closing argument were improper and prejudicial as an expression of belief in both the guilt of the defendants and the credible veracity of the prosecution's witnesses. We cannot agree. As the prosecuting attorney stated, in closing: "We have captured the two bank robbers that went in; we asked them what

happened; they told us what happened; they told you what happened and defense counsel says they are lying. That is as simple as the whole case is." Defense counsel, in closing, stated that Colvin and Fagan were "plain unadulterated fabricators of lies," "people who fabricate things," "unworthy of belief," and "congenital liars." Any remarks that the prosecution may have made were not prejudicial, *see* United States v. Coppola, 479 F.2d 1153 (10th Cir.); Bailey v. United States, 410 F.2d 1209 (10th Cir.); Devine v. United States, 403 F.2d 93 (10th Cir.), and were in a fair response to the basic issue, raised by the defense, of the accomplices' testimony. *Cf.* United States v. Sawyer, 485 F.2d 195 (10th Cir.). The trial court made it clear during the course of closing argument that all of the arguments of counsel, both for the defense as well as prosecution, were not evidence but simply arguments. Included in the court's charge to the jury was the further admonition that "statements and arguments of counsel are not evidence in the case. . . ."

Viewed in the light most favorable to the Government, the evidence supports the jury's finding of guilt. Thus the trial court properly denied the motion for acquittal and the motion for new trial. *See, e.g.,* United States v. Acree, 466 F.2d 1114 (10th Cir.), and cases cited therein.

Other claims made by the appellants have been considered and determined to lack merit.

The judgment of the district court in each case is AFFIRMED.

PETITION FOR REHEARING EN BANC

TO THE HONORABLE JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT:

Your petitioner, Robert Lee Willis, Appellant, hereby petitions this Court for a rehearing in banc and reconsideration of the opinion rendered in the above entitled appeal on the following grounds:

1. The omnibus hearing report provided that the government would disclose to defendant all evidence coming into its hands subsequent to the omnibus hearing on the issue of guilt and discovery of the names and addresses of government witnesses and their statements; but notwithstanding this commitment, the government did not supply defendant with the fact that Herbie Fagan would be a government witness nor did it supply to the defendant or his counsel the letters or copies thereof written to Agent Richard W. Martin, F.B.I., by Herbie Fagan from the Kansas State Penitentiary until after Agent Martin had testified once necessitating his recall as a witness concerning said letters. Furthermore, the Court erred in not ordering Agent Martin to permit defendant to inspect the notes and memoranda which Agent Martin made as to the contents of his letters written from Chicago to Herbie Fagan in the Kansas State Penitentiary. After Agent Martin refused to disclose his notes and memoranda concerning the letters he wrote to Mr. Fagan, and in reply to a request for such notes and memoranda, Agent Martin replied that such notes were none of defense counsel's business. Defense counsel attempted to further cross-examine Agent Martin as to the contents of his notes and memoranda and the Court sustained an objection thereto,

therefore, defendant was not permitted to ascertain what was in such notes. The notes were material for the reason that Agent Martin testified that he did not keep a copy of his correspondence with Herbie Fagan nor of his telephone conversations with him concerning Herbie Fagan's testimony. It is the contention of Appellant, therefore, that the government had in its possession information which would assist defense counsel in cross-examining Herbie Fagan and Agent Martin to test their credibility and to impeach them.

2. Agent Martin, F.B.I., testified that until Monday of the week of the trial which was March 19, 1973, the day the trial started, he did not know that Herbie Fagan was a participant in the robbery (Record Vol. 3, Page 572). He further testified that Herbie Fagan, shortly after the robbery, when interviewed, did not tell him the truth, denying that he knew anything about the robbery. Agent Martin wrote letters to Herbie Fagan in reply to Herbie Fagan's letters to him, Agent Martin disguising his letters as letters from Martin as Herbie Fagan's attorney. The eight letters received by Agent Martin from Herbie Fagan were all written in July, August, September and October, 1972. In one of these letters, Herbie Fagan told Agent Martin that he wanted to testify and nail Willis. In view of the letters from Herbie Fagan to Agent Martin, it is inconceivable that Agent Martin did not know that Fagan was a participant in the robbery until March 19, 1973, when the case went to trial for the second time for an examination of the file in the office of the Clerk of the District Court reveals that the government, on October 30, 1972, issued a writ of Habeas Corpus ad Testificandum for Herbie Fagan's appearance on December 11, 1972 and another Writ of Habeas Corpus ad Testificandum on March 2, 1973 for Herbie Fagan's appearance on March 7, 1973

and he was held at Kansas City on this writ until the trial of Mr. Willis and his co-defendants was concluded. The issuance of these writs for Herbie Fagan's appearance was not disclosed to defense counsel so that defense counsel was not aware that Herbie Fagan was to be called as a witness for the government and the government certainly knew of the letters written by Herbie Fagan to Agent Martin for they were in the possession of the F.B.I.

3. Herbie Fagan testified that he was not concerned about being prosecuted on the bank robbery charge as he was then serving a nine-year to life sentence in the Kansas State prison yet he wanted the government to advise his parole board of his cooperation by testifying against the defendants nor was Herbie Fagan afraid of being prosecuted for the theft of the automobile to which he testified (331). He further testified that he was involved in three bank robberies and has not been charged in any of them (335). He also testified that government witness Colvin lied in the first trial for he was trying to protect Fagan (353, 354). Herbie Fagan has not been charged with the bank robbery involved in this appeal and there is no indication that he will ever be charged with it. Herbie Fagan also testified that Kenneth Lewis told an untruth, in other words lied, when Kenneth Lewis testified that Herbie Fagan was in Los Angeles at the time of the robbery (355). It is the contention of defendant that the credibility of Colvin and Fagan was an important issue in the case and if the government had disclosed the fact that Colvin had lied several times in the first trial and that the government was going to use Herbie Fagan as a witness against defendant in the second trial and that there was in existence eight letters written by Herbie Fagan to Agent Martin from the Kansas Penitentiary and that Herbie Fagan called Agent Martin from

the Kansas State Penitentiary and that the first contact between Fagan and Martin was when Martin wrote a letter to Fagan after he heard that Fagan was in prison asking what he could do for Fagan and furthermore that Agent Martin had made notes and memoranda concerning his subsequent letter to Fagan which he was unwilling to release on the ground that it was none of defense counsel's business in which the Court sustained him, it appears that the government did not disclose evidence material to the defendant in the possession of the government which could be used to affect the credibility of government witnesses or impeach them.

It is therefore respectfully submitted that this case should have been reversed on the holding in DeMarco vs. United States, 94 S.Ct. 1185 (March 18, 1974) ____ U.S. ____ and cases therein cited.

The Court's instructions to the jury in this case appear in the Record at pages 1073 to 1079. In Court's instruction No. 17, the Court stated that an accomplice is one who unites with another person in the commission of a crime, etc., however the Court did not instruct relative to an informant and the fact that there was an absence of an informant instruction was prejudicial to defendant because the jury could interpret the Court's instruction as telling them that Herbie Fagan was an accomplice in the commission of the crime.

The Court's instruction No. 24 is erroneous because the Court therein used this language "You must believe from all the evidence and beyond a reasonable doubt that the facts proven are inconsistent with said defendant's innocence." There may be evidence inconsistent with a defendant's innocence in a criminal case but such evidence may not be proof of guilt or prove guilt beyond a reason-

able doubt but the mere fact that some evidence believable beyond a reasonable doubt is inconsistent with the defendant's innocence is not proof beyond a reasonable doubt that defendant was guilty.

In Court's instruction No. 28, the following language was used "There is nothing peculiarly different in the way a jury is to consider the proof in a criminal case from that in which all reasonable persons treat any question depending upon evidence presented to them." This instruction is inconsistent with reasonable doubt for under this instruction, all the jury has to do is decide the case on the greater weight of the evidence whereas the burden of proof is beyond a reasonable doubt and not the greater weight of the evidence.

4. The trial court should have given defense counsel more than thirty minutes to argue the case which took six days to try for the reason that defense counsel could hardly touch on all facets of the case and the evidence within thirty minutes.

5. Kenneth Leon Lewis, Jr., testified that when he was before the Grand Jury he was shown photographs, that he was not certain of the individuals but he was told they were the individuals who were in question so he therefore went ahead and identified the photographs (page 598, 599). He was then asked why he was unable to identify the defendants at this time. His answer was, "Well, the reason I can't positively identify these people at this particular time is because it has been a while after this thing has happened and if I positively identify these people now, I wouldn't feel within myself that I am rightfully sure." (page 650, 651). The United States attorney then asked that a transcript of the earlier hearing of February 3, 1971 be admitted in evidence as to the

identification of the individual witnesses. The Court said, "He has already acknowledged that he identified the four defendants here at the previous hearing so there is no necessity for it." The United States attorney then said, "May it please the Court, I think at the earlier hearing, he identified four individuals, of the same names, as the defendants in this case. I don't know if counsel would stipulate that they are the same, then we would withdraw our request." The Court then said, "That is a matter that the Court will take judicial notice of from the record." The statement of the trial judge that he would take judicial notice of the fact that the witness had identified the defendants on trial in a previous trial certainly prejudiced the defendant for the Court, in effect, told the jury that the witness had previously identified the defendants. If counsel wished to use the transcript, he should have used it for cross-examination by asking if the question was asked and if the answer was given as per the transcript but he chose not to do this and the matter of whether or not a witness identified a defendant is not a matter that the Court can take judicial notice of for the reason that it is incumbent upon the prosecution to prove the guilt of the defendants beyond a reasonable doubt.

6. Relative to appellant's contention regarding instructions, Appellant adopts by reference what was said in his brief at pages 32 to 34, inclusive, and as in the brief, it is his contention that instructions Nos. 17, 24 and 28 were erroneous and prejudicial to defendant.

7. In argument to the jury, defense counsel did tell the jury that Colvin and Fagan were liars for they admitted on cross-examination several times that they lied to protect each other and Appellant contends that when witnesses admit they lied under oath, this fact can certainly be argued to the jury and the fact that such argument was

made is no excuse for the prosecutor making the allegations, as he did at page 1183, that the defense asserted that this Court, as well as other United States District Courts, condone, encourage and want perjury from the people who, say, it is conducting a pre-sentence for and also the United States Board of Paroles wants and encourages perjury. This statement was objected to by defense counsel on the ground that there was no such assertion by defense counsel and the Court said, "Well, members of the jury, this is just argument. That's all it is. You can take it for what it is worth." In effect, telling the jury that they could consider counsel's statement that the defense made such a contention. Counsel for the government also said that Harris and Willis are at the top of the organization and they are the ones responsible. This is also a prejudicial statement for there is no testimony in the record that Harris and Willis were at the top of any organization or belonged to an organization. The prosecutor also said, "I submit to you the government witnesses were as truthful as they could possibly be. They told you everything they know. They weren't trying to trump up anything. We are not trying to trump up anything." We believe the assertions of the prosecutor are contrary to the holding of this Court in United States vs. Coppola, 479 F.2d 1153.

For the reasons set forth in this motion, it is respectfully submitted that this petition for rehearing should be sustained and the appeal set down for re-argument.

Respectfully submitted,

/s/ Thomas E. Joyce
Thomas E. Joyce

ORDER DENYING PETITION FOR REHEARING

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing en banc filed by the appellants in the captioned companion cases.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges Seth and Doyle (Judge Breitenstein did not vote), to whom the cases were argued and submitted.

The petition for rehearing having been denied by the original panel to whom the cases were argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/ Howard K. Phillips
Howard K. Phillips
Clerk

JUDGMENT

(Filed June 6, 1974)

This cause came on to be heard on the record on appeal from the United States District Court for the DISTRICT OF KANSAS and was argued by counsel. On consideration whereof, it is ordered that the judgment of said court is AFFIRMED. It is further ordered by this court that ROBERT LEE WILLIS, appellant, surrender himself to the custody of the United States Marshal for the DISTRICT OF KANSAS in execution of the judgment and sentence imposed upon him within ten days from and after the date of the filing of the mandate of this court in said district court.

Howard K. Phillips
Clerk

By: /s/ Lavon M. Selbeck
Deputy Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1919

ROBERT LEE WILLIS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 73-6934

WILLIAM WESLEY HARRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Both petitioners contend that they were prejudiced by remarks in government counsel's closing argument. Petitioner Willis contends that certain FBI notes should have been made available to him. Petitioner Harris contends that certain of the trial court's instructions were erroneous.

Following a jury trial in the United States District Court for the District of Kansas, petitioners and two others were convicted of armed robbery of a federally

insured bank, in violation of 18 U.S.C. 2, 2113(a) and (d). Both were sentenced to terms of eighteen years' imprisonment. Because an arrangement between the prosecution and a witness had not been revealed, the court of appeals reversed and remanded for a new trial. *United States* v. *Harris*, 462 F. 2d 1033 (C.A. 10). At the second trial petitioners were again found guilty and received the same sentence. The court of appeals affirmed (494 F. 2d 1273, Pet. App. A1-A4).

The indictment charged seven co-defendants [1] with the armed robbery of the Tower State Bank of Kansas City, Kansas, on November 9, 1970. Thomas Colvin and Kenneth Lewis, Jr., the two co-defendants who entered the bank and took $15,732 at gunpoint, pleaded guilty prior to trial and testified for the government. Herbert Fagan, who was serving a prison sentence for another offense at the time of petitioners' second trial and was not charged in the indictment, also testified in considerable detail about the planning and execution of the robbery. The evidence, in a light most favorable to the government, showed that petitioners planned the robbery, which was carried out by Colvin and Lewis. After Colvin and Lewis robbed the bank they abandoned their getaway car at a prearranged rendezvous with Misses Odom and Monroe, jumped into the trunk of the women's rented car and were driven to the place where the proceeds of the robbery were divided and distributed by petitioners and Colvin.

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[1] Thomas J. Colvin, Jr., William W. Harris, Kenneth L. Lewis, Jr., Rosalind E. Monroe, Marcella P. Odom, Robert Lee Willis and Kenneth L. Gordon.

1. Petitioners contend that they were prejudiced by certain statements of government counsel in closing argument.

(a) Government counsel stated:

> The defense also asserts that this Court as well as other United States District Courts, condones, encourages and wants perjury from the people who, say, it is conducting a pre-sentence for and also the United States Board of Parole wants and encourages perjury [Tr. 1183-1184].

As the court of appeals held, this was a fair response to the numerous allegations by defense counsel that the key government witnesses were lying.[2] See *United States* v. *Bursten*, 453 F. 2d 605, 611 (C.A. 5), certiorari denied, 409 U.S. 843. The objections pressed now to this and one similar remark by government counsel are not persuasive.

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[2]Some examples: "Well, this man is a scoundrel and a pathological liar. * * * He would say anything to get out of prison by his own testimony" (Tr. 1117, Attorney Bachofer commenting on Fagan). "He is a piece of garbage. He can't be believed * * * except that he wants to get out of prison, * * * literally, not figuratively * * * " (Tr. 1120, Attorney Bachofer commenting on Colvin). "Now, I'm not saying Mr. Kelly came to him or Mr. Martin came to him and said, 'Herbie, we want you to lie for us.' I'm not saying that. But they probably came to him and said, 'Listen, you told us you want to help us. Do you want to really help us? Come on and testify.' Now they didn't bother to ask him whether or not this was a true statement and you know he hasn't been charged yet, so they don't really care. They just want some more people in here. They got to build their case. Why did they do that? They felt the case was weak, at least against Marcella. They had to get that little final bit. You know, they had to try to bury her, bury her, put her away, because that's the way they think. Well, listen, they have got a job to do; you can't hold that against them" (Tr. 1147-1148, Attorney Lerner commenting on Fagan).

(b) Subsequently, government counsel stated:

> Well, Mr. Fagan, I submit, knows that Harris and Willis are at the top of the organization and they are the ones responsible and for that reason he has talked about them and the organization, meaning them all [Tr. 1187].

Counsel objected that there had been no evidence presented as to the existence of an organization; the court concurred and sustained the objection (Tr. 1187).

The prosecutor's use of the term "organization" was not outside the bounds of propriety. The weight of the evidence against petitioners and the delineation of the key roles they played in a well-organized crime was overwhelming. Petitioners planned the robbery, organizing and supervising seven other individuals in an elaborate operation.[3] Planning for the robbery included selection of an escape route, finding out how many police cars were in the area and whether there was a security guard in the bank, obtaining two getaway cars (one stolen and one rented), deciding who would go in the bank, who would drive, how many guns were needed, if a mask would be used, and arranging for a change of clothes. Viewed in the context of the evidence presented at trial, the remark concerning "the organization" was more likely to be interpreted by the jury as a reference to the planning and execution of the robbery than to any "mafia" or underworld connections, as petitioners contend. Cf. *Donnelly* v. *DeChristoforo*, No. 72-1570, decided May 13, 1974.

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[3]For example, petitioners instructed Fagan and an associate, Horace Humphreys, to pick up Colvin in Kansas City, Missouri, and bring him to Kansas for the robbery (Tr. 289-290); Fagan communicated the results of "checking out" the bank robbery site to petitioners, who double-checked the area, decided they liked it, and told Fagan (Tr. 295) and his associate they would get in touch with them at a later date to help commit the crime (Tr. 297-298).

In any event, the trial court carefully instructed the jury, on several occasions, that the statements and arguments of counsel were not evidence (Tr. 1087, 1179, 1184, 1217). Moreover, the objection to this particular remark was sustained. Under such circumstances petitioners' contention that the jury was improperly influenced by the statement is insubstantial. See, *e.g.*, ***Bailey*** v. ***United States,*** 410 F. 2d 1209, 1214 (C.A. 10), certiorari denied *sub nom.* ***Freeman*** v. ***United States,*** 396 U.S. 933.

(c) Although co-defendant Lewis, one of the two bank robbers who pleaded guilty, had been able to identify petitioners and their co-defendants at the first trial, he refused to do so at the second trial stating: "Well, the reason I can't positively identify these people at this particular time is because it has been awhile after this thing has happened and if I positively identified these people now, I wouldn't feel within myself that I am rightfully sure" (Tr. 651). Government counsel then offered the transcript of the earlier hearing in evidence as to the identification of the individuals. However, the court ruled this was unnecessary because the witness had already acknowledged that he had identified the four defendants at the previous hearing.[4] Government counsel then asked for a stipu-

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[4]Tr. 597-598:

[Mr. Hamill] Q. You remember that earlier hearing, then?
[Lewis] A. Vaguely.
Q. And were you asked to identify them at that earlier hearing?

* * * * *

A. Yes, I believe I did.

* * * * *

lation by defense counsel; the court interjected that it would take judicial notice of the earlier identification.[5] Since the circumstances surrounding the witness' earlier identification were fully explored by defense counsel (Tr. 597-599, 649-665), petitioners' rights were fully protected.

Petitioner Willis' contention that government counsel's statement in closing argument, "[a]nd as to Mr. Lewis, well, he probably helped himself as much as he could by refusing to identify the defendants. We are not mad at him. We won't be out to get him" (Tr. 1199), was prejudicial is without merit. This comment was a reasonable inference that could be drawn, and the court scrupulously instructed the jury many times that counsel's comments were merely argument.

2. Petitioner Willis contends (Pet. 14) that he was entitled to letters FBI Agent Martin wrote to government witness Fagan, and to any notes concerning those letters. Evidence at trial revealed that Agent Martin, who assisted in the investigation of the robbery but was subsequently transferred to the FBI office in Chicago, engaged in personal correspondence with Fagan beginning in mid-July 1972 (Tr. 532). Martin testified about the personal relationship between himself and Fagan which pre-

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[Mr. Joyce]	Q. Did you identify them at that time because someone had pointed them out to you and you got your information as to who they were that way or did you actually remember them?
The Witness:	A. At that present time, it was familiar to me.

[5]Although Lewis did not identify petitioners at the second trial, he described the events of the robbery and the involvement of the individuals known to him as Bob Willis, William Harris, Marcella Odom, Rosalind Monroe, Tom Colvin and Kenneth Gordon (Tr. 638-639).

cipitated the correspondence (Tr. 534-544, 552-553). Martin did not make copies of his letters to Fagan, which he regarded as personal (Tr. 544); he did retain the letters to him from Fagan. During cross-examination of Fagan the government attorney voluntarily turned over to defense counsel the letters from Fagan to Martin (Tr. 385).

There is no evidence that any notes concerning the letters were made by Agent Martin. Even had notes been made they would not have been discoverable under 18 U.S.C. 3500 or Fed. R. Crim. P. 16. The Jencks Act, 18 U.S.C. 3500, protects government files from unwarranted disclosure while requiring the government, after a witness has testified, to make available statements of the witness which it has in its possession. Assuming Fagan's letters to the agent are "statements" for Jencks Act purposes, any notes made by Martin concerning the correspondence were at most personal reactions. They were not "statements" under Section 3500 because the witness neither signed nor otherwise "adopted or approved" them.[6] 18 U.S.C. 3500(e); see *United States* v. *Turner*, 442 F. 2d 1146 (C.A. 8). See also *United States* v. *Roberts*, 455 F. 2d 930 (C.A. 5), certiorari denied, 405 U.S. 1050.

Petitioner Willis does not argue that the notes, had they existed, would have been helpful to the defense; consequently no issue of a duty to disclose under *Brady* v. *Maryland*, 373 U.S. 83, is presented.

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[6]Nor does Rule 16 provide for the recovery of such notes which, even characterized most favorably to petitioner Willis, are the "work product" of Agent Martin. Rule 16 contains a specific exclusion for statements protected from disclosure by the Jencks Act.

3. Petitioner Harris alleges that he was prejudiced by the "refusal" of the trial court to grant his request for an instruction that the identification made by a government witness may be unreliable.[7] The following colloquy took place between petitioner's counsel and the court:

> THE COURT: Mr. Bachofer, do you have any objections to the instructions or any additional requested instructions?
>
> MR. BACHOFER: *Well, Your Honor, I don't have any objection.* I just happened to think and I don't have one prepared and perhaps we should have one on identification.
>
> THE COURT: Well, there has not been one submitted and I think it is adequately covered by the Court's instructions so your request will be denied. [Tr. 1221; emphasis supplied.]

Having failed either to proffer an instruction or to object specifically to the instructions given by the court, petitioner cannot now raise the issue.[8] Fed. R. Crim. P. 30; *United States* v. *Wheeler*, 444 F. 2d 385, 388 (C.A. 10).

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[7]The identification in question, placing petitioner in the vicinity of the Tower State Bank on the date of the robbery, was made by Elroy Stuerke, who was deceased at the time of his trial. A transcript of his testimony from the previous trial was introduced into evidence (Tr. 229-251). The circumstances surrounding this positive identification (Tr. 237) were fully explored on cross-examination at the first trial.

[8]Nor was there "plain error". The instruction given was adequate and the cases relied upon by petitioner are inapposite. *Salley* v. *United States*, 353 F. 2d 897 (C.A.D.C.), involved a sale of narcotics to an undercover agent. The court held it was error to fail to instruct on the defendant's theory of defense, mistaken identity, where the possibility of erroneous identification was obvious. In *Macklin* v. *United States*, 409 F. 2d 174 (C.A. D.C.), the court held

4. Petitioner Harris' contention that the trial court erred in overruling an objection to instruction No. 28 is frivolous. The trial court gave a correct and adequate instruction on "reasonable doubt" (Tr. 1204-1205). The argument that subsequent instruction No. 28, which told the jury to use "good sense" in considering the evidence, somehow confused or modified the instruction on reasonable doubt is baseless. Petitioner's rights have been amply protected.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1974.

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that the trial court should, in cases where identification is a major issue, *sua sponte* give an identification instruction. Although we believe the essential safeguard is the exposure of identification testimony to rigorous cross-examination, it is nevertheless clear that identification was not a major issue in the instant case. The critical testimony was that proffered by petitioners' accomplices.

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